A

Flextronics Technology (M) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd and another appeal

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02 (NCVC)(W)-822–05 OF 2015 AND P-02 (NCVC)(W)-823–05 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
8 FEBRUARY 2017

C

Civil Procedure — Attachment — Garnishee order — Plaintiff sued defendant for monies owing on goods sold and delivered — Defendant alleged plaintiff's claim was extinguished when debt it owed plaintiff was garnished by plaintiff's judgment creditor — Plaintiff deliberately did not attend garnishee proceedings to
D *dispute amount to be garnished nor challenged garnishee order absolute in any way — Whether plaintiff could not collaterally challenge propriety of garnishee order absolute in its suit against defendant — Whether defendant's debt to plaintiff discharged following payment of garnished sum to judgment creditor — Rules of Court 2012, O 49 rr 1 and 8*

E

The two appeals herein arose out of a claim by Bumicircuit Technologies (M) Sdn Bhd ('Bumicircuit') against Flextronics Technology (M) Sdn Bhd ('Flextronics') and a counterclaim filed by the latter against the former. Bumicircuit claimed that Flextronics owed it USD120,907.86 for printed
F circuit boards ('PCB') it had supplied to Flextronics. Flextronics' counterclaim was two-pronged, ie, for the refund of USD89,582.07 it had overpaid Bumicircuit plus a sum of USD16,369.79 it claimed Bumicircuit should compensate it for supplying PCBs that were faulty and of poor quality. Flextronics pleaded that Bumicircuit's claim against it was extinguished when
G it paid USD210,027.02 to Bumicircuit's judgment creditor, Welfare Printed Circuit Boards Co Ltd ('Welfare') pursuant to a garnishee order absolute Welfare had obtained to attach that sum to satisfy a judgment debt of more than RM4.2m. At the garnishee proceedings, which Bumicircuit was aware of but did not attend, the said USD210,027.02 was determined to be the debt
H then due or accruing due from Flextronics to Bumicircuit. Bumicircuit, however, contended that it did not know about the garnishee proceedings and that, in any event, what Flextronics actually owed at that time was only USD5,595.20 and not USD210,027.02 because Flextronics had an agreed credit period to settle invoiced sums and such periods only ran after Flextronics
I had used the delivered PCBs. Hence, although the amounts billed to Flextronics in excess of USD5,595.20 were ascertainable their payment was not due as the sums involved had not matured and therefore they should not have been garnished. Accordingly, Bumicircuit argued, Flextronics should only have paid USD5,595.20 to Welfare and it still owed Bumicircuit the balance of

the amount claimed in the suit. Bumicircuit denied that there was any overpayment by Flextronics because the latter had been supplied with all PCBs it had ordered and paid for. As to that part of the counterclaim relating to PCBs that were faulty and of poor quality, Bumicircuit said it was not liable as Flextronics did not make any complaint regarding supplies within seven days of their receipt as was the condition stated in the delivery orders and invoices. After a full trial, the High Court dismissed both the claim and the counterclaim resulting in the instant appeals by the respective parties. With regard to Bumicircuit's claim, the trial court found that the USD210,027.02 was the 'amount accruing due' by Flextronics to Bumicircuit when the garnishee order nisi was made absolute and that upon payment to Welfare of that sum, Flextronics was discharged of its liability to Bumicircuit under O 49 r 8 of the Rules of Court 2012. The trial court held that although the facts showed that Bumicircuit was aware of the garnishee order nisi it failed to attend the hearing to dispute the sum to be garnished and allowed the order to be made absolute and took no steps to challenge the order. With regard to the counterclaim, the trial judge held that: (a) there was no overpayment by Flextronics because it had received all the PCBs it had ordered and paid for; and (b) Flextronics did not plead the issue of faulty/'no quality' PCBs and did not 'canvass or ventilate' that issue at the trial and that, in any event, it could not complain of defects in the goods once the period given for their return had expired.

Held, allowing Flextronics' appeal against the dismissal of its counterclaim and dismissing Bumicircuit's appeal against the dismissal of its claim:

(1) The High Court was entirely correct in its decision to dismiss Bumicircuit's claim. Since Bumicircuit did not challenge either the judgment obtained against it by Welfare or the garnishee order absolute, it could not challenge that judgment/order collaterally through Flextronics. Insofar as Flextronics was concerned, the amount garnished by Welfare had to be the amount Flextronics owed Bumicircuit at the material time. If Bumicircuit had doubt as to that amount, it should have attended the garnishee hearing. It was far too late to complain now. In any case, the trial judge saw it fit to satisfy himself as to the correctness of the amount and this court had no reason to disagree with him (see para 12).

(2) This court agreed with the trial judge on the amount that was garnished. In no way could the garnished amount have been USD5,592.20 as claimed by Bumicircuit. The amount that was garnished included and comprised the amount then due from Flextronics to Bumicircuit for PCBs supplied and Flextronics did pay Welfare the sum of USD210,027.02 towards satisfaction of Welfare's judgment debt against Bumicircuit. With that payment, Flextronics was validly discharged in law and on the facts from its liability to Bumicircuit for that amount as

provided under O 49 r 8 of the Rules of Court 2012 and Bumicircuit's claim against Flextronics was consequently extinguished (see paras 15 & 31–32).

(3) This court agreed with the trial judge's finding that just because there were contractual credit periods for Flextronics to pay Bumicircuit on PCBs supplied, that did not mean the debt was not accruing due within the meaning of O 49 r 1 of the Rules of Court 2012. Bumicircuit should have raised its dispute about the garnishment amount in court before the garnishee order nisi was made absolute or in proceedings to set that order aside. It was too late and highly inappropriate for it to challenge the garnished amount through this action and even then through a reply to Flextronics's defence and a defence to the counterclaim. Bumicircuit's complaints were of no merit. The phrase 'the amount of any debt due or accruing due to the judgment debtor from the garnishee' included the debt that Flextronics owed Bumicircuit at the material time, even if the payment was payable at a deferred date with the credit terms purportedly agreed upon between the parties. The debt must be in existence at the time of the application, though the time for payment might be sometime in the future. It would have been different if the debt sought to be garnished was a contingent debt which was 'not a debt at all' (see paras 19 & 29).

(4) Examining the total sales and payment, according to the evidence, up to June 2012, there was a total sale of PCBs by Bumicircuit to Flextronics of USD383,883.32. For these sales, Flextronics paid a total sum of USD473,465.39 made up of the garnished sum of USD210,027.02, and two payments in March and April 2012 of USD92,075.16 and USD171,365.18 respectively. There was indeed overpayment by Flextronics for which Bumicircuit had no explanation. Flextronics had satisfactorily proved its case of overpayment and this part of its counterclaim should have been allowed by the trial judge (see paras 38–39).

(5) The dismissal of the other component of the counterclaim for USD16,369.79 in respect of faulty goods and goods of 'no quality' by the trial court was also wrong. The issue was indeed properly pleaded, canvassed and quite fully ventilated by both parties before the trial court. In accordance with the terms and conditions of the purchase orders, Flextronics informed Bumicircuit to take the defective goods back but the latter did not do so. Flextronics then attempted to return the defective PCBs via freight but Bumicircuit refused to accept delivery and it also refused to replace them. There was oral evidence supported by contemporaneous documentary evidence to support Flextronics' claim but all these pieces of evidence were not considered at all by the trial judge. Flextronics' counterclaim was clearly satisfactorily proved and this

aspect of the counterclaim, too, should have been allowed by the trial court (see paras 41, 44–45 & 48–49).

[Bahasa Malaysia summary

Kedua-dua rayuan ini timbul daripada tuntutan oleh Bumicircuit Technologies (M) Sdn Bhd ('Bumicircuit') terhadap Flextronics Technology (M) Sdn Bhd ('Flextronics') dan tuntutan balas yang difailkan oleh Flextronics terhadap Bumicircuit. Bumicircuit mendakwa Flextronics berhutang USD120,907.86 bagi papan litar bercetak ('PCB') yang dibekalkan kepada Flextronics. Tuntutan balas Flextronics adalah dua arah, iaitu, bagi bayaran balik USD89,582.07 yang telah terlebih bayar olehnya kepada Bumicircuit dan sejumlah USD16,369.79 yang dikatakan Bumicircuit harus memampas kerana membekalkan PCB yang rosak dan berkualiti rendah. Flextronics memplidkan tuntutan Bumiputra terlupus apabila Flextronics membayar USD210,027.02 kepada pemiutang penghakiman Bumicircuit, Welfare Printed Circuit Boards Co Ltd ('Welfare') menurut perintah garnishee mutlak yang Welfare perolehi untuk mengemukakan jumlah jumlah tersebut untuk melunaskan hutang penghakiman berjumlah lebih RM4.2 juta. Semasa prosiding garnishee, yang Bumicircuit sedari tetapi tidak hadiri, USD210,027.02 tersebut diputuskan sebagai terhutang atau terakru terakru terhutang daripada Flextronics kepada Bumicircuit. Bumicircuit, walau bagaimanapun, berpendapat bahawa kerana tidak tahu tentang prosiding garnishee dan bahawa, dalam apa keadaan, apa yang Flextronics sebenarnya berhutang pada masa itu hanya USD5,595.20 dan bukan USD210,027.02 kerana Flextronics mempunyai tempoh kredit yang disetujui untuk menyelesaikan jumlah invois dan tempoh tersebut hanya bermula selepas Flextronics telah menggunakan PCB yang dihantar. Oleh itu, walaupun amaun yang dibilkan kepada Flextronics melebihi USD5,595.20 dihitung, bayaran mereka tidak tertunggak kerana jumlah yang terlibat tidak matang dan oleh itu, tidak sepatutnya digarnis. Oleh itu, Bumicircuit menghujahkan Flextronics hanya perlu membayar USD5,595.20 kepada Welfare dan masih berhutang Bumicircuit baki jumlah yang dituntut dalam saman tersebut. Bumicircuit menafikan bahawa terdapat apa-apa kelebihan bayaran oleh Flextronics kerana Flextronics dibekalkan dengan semua PCB yang dipesan dan dibayar. Tentang bahagian tuntutan balas yang berkaitan dengan PCB yang rosak dan berkualiti rendah, Bumicircuit mendakwa tidak bertanggungjawab kerana Flextronics tidak membuat apa-apa aduan tentang bekalan dalam tempoh tujuh hari dari resit mereka seperti disyaratkan dalam dalam pesanan penghantaran dan invois. Selepas perbicaraan penuh, Mahkamah Tinggi menolak kedua-dua tuntutan itu dan tuntutan balas, menimbulkan rayuan ini oleh pihak-pihak. Berkenaan tuntutan Bumicircuit, mahkamah bicara mendapati USD210,027.02 adalah 'jumlah terhutang terakru' oleh Flextronics kepada Bumicircuit apabila perintah garnishee nisi dibuat mutlak dan bahawa setelah pembayaran jumlah itu dibuat kepada Welfare, Flextronics terlepas daripada kewajipannya kepada Bumicircuit

bawah A 49 k 8 Kaedah-Kaedah Mahkamah 2012. Mahkamah bicara berpendapat bahawa walaupun fakta-fakta menunjukkan Bumicircuit menyedari perintah garnishee nisi, Bumicircuit gagal menghadiri perbicaraan untuk mempertikaikan jumlah yang akan digarnis dan membenarkan perintah itu dibuat mutlak dan tidak mengambil langkah untuk mencabar perintah tersebut. Berkenaan tuntutan balas, hakim bicara berpendapat bahawa: (a) tidak ada bayaran lebih oleh Flextronics kerana Flextronics telah menerima semua PCB yang dipesan dan dibayar; dan (b) Flextronics tidak memplidkan isu PCB yang cacat/'tidak berkualiti' dan tidak 'membatalkan atau menyelesaikan' isu tersebut semasa perbicaraan dan bahawa, dalam apa-apa keadaan, Flextronics tidak dapat mengadu tentang kecacatan barang sebaik sahaja tempoh yang diberi untuk pulangan tamat.

Diputuskan, membenarkan rayuan Flextronics terhadap penolakan pembelaannya dan menolak rayuan Bumicircuit terhadap penolakan tuntutannya:

(1) Mahkamah Tinggi sememangnya betul dalam keputusannya menolak tuntutan Bumiputra. Oleh kerana Bumicircuit tidak mencabar sama ada penghakiman yang terhadapnya oleh Welfare atau perintah garnishee mutlak, Bumicircuit tidak boleh mencabar penghakiman/perintah kolateral melalui Flextronics. Berkenaan Flextronics, jumlah yang digarnis oleh Welfare terpaksa menjadi jumlah yang terhutang oleh Flextronics pada Bumicircuit pada masa material. Sekiranya Bumicircuit meragui jumlah tersebut, ia sepatutnya menghadiri pendengaran garnishee. Sudah terlambat untuk mengadu sekarang. Dalam apa-apa keadaan, hakim bicara melihatnya sesuai untuk memuaskan diri beliau tentang ketepatan jumlah dan mahkamah ini tidak mempunyai sebab untuk tidak bersetuju dengan beliau (lihat perenggan 12).

(2) Mahkamah ini bersetuju dengan hakim bicaraan tentang jumlah yang digarnis. Tidak semestinya jumlah yang dijanjikan adalah USD5,592.20 seperti yang didakwa oleh Bumicircuit. Jumlah yang digarnis termasuk dan terdiri daripada jumlah yang kemudiannya terhutang daripada Flextronics kepada Bumicircuit untuk PCB yang dibekalkan dan Flextronics membayar Welfare USD210,027.02 bagi melunaskan hutang penghakiman Welfare terhadap Bumicircuit. Dengan bayaran itu, Flextronics dilepaskan secara sah dalam undang-undang dan fakta-fakta daripada tanggungannya kepada Bumicircuit untuk jumlah tersebut seperti yang diperuntukkan bawah A 49 k 8 Kaedah-Kaedah Mahkamah 2012 dan tuntutan Bumicircuit terhadap Flextronics dilupuskan (lihat perenggan 15 & 31–32).

(3) Mahkamah ini bersetuju dengan keputusan hakim bicara bahawa hanya terdapat tempoh kredit kontrak untuk Flextronics membayar Bumicircuit bagi PCB yang dibekalkan, yang tidak bermaksud hutang

itu tidak terakru dalam maksud A 49 k 1 Kaedah-Kaedah Mahkamah 2012. Bumicircuit sepatutnya menimbulkan pertikaian tentang jumlah garnis di mahkamah sebelum perintah garnishee nisi mutlak dibuat atau dalam prosiding menetapkan perintah tersebut. Sudah terlambat dan sangat tidak sesuai untuk mencabar jumlah yang digarnis melalui tindakan ini bahkan melalui jawapan pembelaan Flextronics dan pembelaan terhadap tuntutan balas. Aduan Bumicircuit tidak bermerit. Frasa 'amaun hutang yang perlu dibayar atau terakru disebabkan oleh penghutang penghakiman dari garnishee' termasuk hutang Flextronics pada Bumicircuit pada masa material, walaupun bayaran itu dibayar pada tarikh tertunda dengan syarat kredit yang kononnya disetujui antara pihak-pihak. Hutang tersebut mestilah wujud pada masa permohonan, walaupun masa pembayaran mungkin kadangkala pada masa akan datang. Adalah berbeza jika hutang yang dijadikan garnis adalah hutang kontingen yang 'bukan hutang sama sekali' (lihat perenggan 19 & 29).

(4) Memeriksa jumlah jualan dan bayaran, berdasarkan keterangan, hingga Jun 2012, terdapat jualan PCB oleh Bumicircuit kepada Flextronics sebanyak USD383,883.32. Bagi jualan ini, Flextronics telah membayar jumlah keseluruhan sebanyak USD473,465.39 yang terdiri daripada jumlah wang yang dicatatkan sebanyak USD210,027.02, dan dua bayaran pada bulan Mac dan April 2012 masing-masing sebanyak USD92,075.16 dan USD171,365.18. Terdapat lebihan bayaran oleh Flextronics yang tidak dijelaskan Bumicircuit. Flextronics telah membuktikan kes lebihan bayaran dan sebahagian tuntutan balasnya sepatutnya dibenarkan oleh hakim bicara (lihat perenggan 38–39).

(5) Penolakan komponen lain dalam tuntutan balas USD16,369.79 berkenaan barang-barang rosak dan 'tidak berkualiti' oleh mahkamah bicara juga salah. Isu ini sememangnya diplidkan, ditangani dan diputuskan sepenuhnya oleh kedua-dua pihak sebelum mahkamah bicara. Selaras dengan terma dan syarat pesanan pembelian, Flextronics memaklumkan pada Bumicircuit untuk mengambil balik barang yang rosak tetapi Bumicircuit tidak berbuat demikian. Flextronics kemudian cuba mengembalikan PCB yang rosak melalui muatan tetapi Bumicircuit enggan menerima penghantaran dan juga enggan menggantikannya. Terdapat keterangan lisan yang disokong oleh keterangan dokumentari yang menyokong tuntutan Flextronics tetapi semua bukti-bukti ini tidak dipertimbangkan oleh hakim bicara. Tuntutan balas Flextronics telah terbukti dengan memuaskan dan aspek tuntutan balas ini juga harus dibenarkan oleh mahkamah bicara (lihat perenggan 41, 44–45 & 48–49).]

Notes

For cases on garnishee order, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2286–2295.

Cases referred to

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353, CA (distd)

Hall and Another v Pritchett The Corporation of Huddersfield, Garnishees (1877) 3 QBD 215, QBD (refd)

Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, garnishee) [1988] 1 MLJ 434 (refd)

O'Driscoll and Another v Manchester Insurance Committee [1915] 3 KB 499, CA (refd)

Saw Swan Kee v Sim Lim Finance (M) Berhad [1985] 1 MLJ 221, FC (refd)

Tapp v Jones; Pooley, Garnishee (1875) LR 10 QB 591, QB (refd)

Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 1) [2014] 4 MLJ 398, CA (refd)

Webb v Stenton & Others, Garnishees (1883) 11 QBD 518, CA (refd)

Legislation referred to

National Land Code
Rules of Court 2012 O 49, O 49 rr 1, 2, 8
Rules of the High Court 1980 O 49 r 1

Appeal from: Civil Suit No 22NCVC-21–01 of 2013 (High Court, Pulau Pinang)

Daphne Koo Su Mei (Kwong Chiew Ee with her) (Rahmat Lim & Partners) for the appellant.

Ung Chirt Kye (Kee Wen Jing and Sunny Khoo with him) (Phee, Chen & Ung) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] These two appeals were heard together. In the first appeal, Civil Appeal No P-02 (NCVC)(W)-822–05 of 2015, the appellant is Flextronics Technology (M) Sdn Bhd whereas the appellant in the second appeal, Civil Appeal No P-02 (NCVC)(W)-823–05 of 2015, is Bumicircuit Technologies (M) Sdn Bhd. In view of the two appeals by both parties, we shall refer to them as Bumicircuit (the plaintiff) and Flextronics (the defendant). After a full trial, the learned High Court judge dismissed Bumicircuit's claim and Flextronics' counterclaim. Both parties have filed separate appeals. Upon hearing counsel including considering their written submissions and upon careful consideration of the grounds of decision of the learned trial judge and the

records of appeal, we unanimously allowed the first appeal effectively allowing the defendant's counterclaim and dismissed the second appeal. These are our reasons.

[2] Bumicircuit is a company that supplies printed circuit boards known in the industry as PCB or interface boards. Flextronics is an electronic manufacturing services provider. As part of its contract manufacturing works, Flextronics purchases various components and parts from suppliers such as Bumicircuit in order to manufacture products for its customers. Between October 2011–June 2012, Bumicircuit supplied PCB's to Flextronics pursuant to the latter's purchase orders. The arrangements agreed between them was that Flextronics has 60 days net credit to settle each invoiced sum. As at end of April 2012, Bumicircuit claimed that there was a sum of USD120,907.86 equivalent to RM369,978.95 (based on an exchange rate of RM3.06:USD1) still outstanding. This sum remained unpaid despite Bumicircuit's demands.

[3] In defence, Flextronics claimed that on 5 March 2012, it was served with a garnishee order nisi dated 29 February 2012 (garnishee order) obtained by Welfare Printed Circuits Board Co Ltd vide Penang High Court Civil Suit No 22NCVC-391 of 2011 following a judgment that Welfare Printed Circuits Board Co Ltd had entered against Bumicircuit on 9 January 2012 ('Welfare judgment'). The Penang High Court fixed 16 March 2012 for the parties to show cause as to why the garnishee order nisi should not be made absolute. Flextronics claimed that it had duly informed Bumicircuit of the show cause date. Bumicircuit did not attend court on 16 March 2012 and so the garnishee order nisi was made absolute and Flextronics was ordered to pay a sum of USD214,929.19 to Welfare. On 26 April 2012, Flextronics paid a sum of USD210,027.02 to Welfare, after deducting for costs and some adjustments arising from a misdirection by Flextronics at the hearing when the garnishee order nisi was made absolute. Flextronics claimed that this payment was in satisfaction of the garnishee order absolute and Welfare accepted the payment. Bumicircuit did not take any steps to set aside or challenge the Welfare judgment or the garnishee order.

[4] Flextronics further claimed that at around the time of the garnishee proceedings, Bumicircuit was supposed to deliver specific quantities of PCB's to Flextronics. Bumicircuit refused to deliver unless Flextronics made an advance payment of USD92,075.16 to Bumicircuit. Flextronics claimed that on 28 March 2012, it paid that sum under protest because it 'urgently required the interface boards to meet its contractual obligations with its customers'. Flextronics claimed that the PCB's which were supposed to be delivered on or before 2 April 2012 were not fully delivered. Instead, Bumicircuit only delivered PCB's up to the value of USD42,601.88. On 16 April 2012, Bumicircuit told Flextronics that it would not deliver anymore PCB's unless

Flextronics paid a further sum of USD171,363.18 to Bumicircuit. Flextronics claimed that once again, it paid under protest. With all these payments, Flextronics claimed that there was in effect, an overpayment of USD89,582.07. The initial sum pleaded was USD105,951.86.

[5] Aside from a claim of over-payments, Flextronics also claimed that in breach of the express and/or implied warranties that the PCB's delivered would be free from defects in materials, workmanship and design for a period of two years from receipt by Flextronics, the PCB's delivered by Bumicircuit were faulty and/or of poor quality. Flextronics claimed that despite being informed to collect these faulty and/or poor quality PCB's, Bumicircuit refused; and further refused to credit the amounts for these faulty and/or poor quality PCB's or even replace the same. Flextronics counter-claimed a sum of USD16,369.79 for these PCB's as well as a refund of the sum of USD89,582.07 for the overpayment explained earlier.

[6] In relation to the garnishee proceedings, Bumicircuit denied any knowledge of such proceedings; claimed that it was only informed of the proceedings after Flextronics had paid over to Welfare and, further claimed that only a sum of USD5,595.20 and not USD210,027.02 ought to have been garnished as Flextronics owed Bumicircuit that amount at the time of the garnishee proceedings. The parties had met to discuss this discrepancy and Bumicircuit alleged that Flextronics had agreed that it would only pay over USD5,595.20 in which case, Flextronics remained liable for the sum claimed by Bumicircuit.

[7] On the claim of breach of warranties, Bumicircuit denied existence of such warranties, pleading that the delivery orders and invoices required 'defective goods and any discrepancy should be informed within 7 days from the date received, otherwise no rejected goods or liabilities are accepted'. Since Flextronics did not advise within those terms, Bumicircuit was not liable. Bumicircuit also claimed that it had fully delivered PCB's of the amounts and sums that it had invoiced Flextronics. There was therefore no overpayment or any amount due from Bumicircuit to Flextronics but the converse was true in respect of Bumicircuit's claim.

[8] At the trial, the learned High Court judge identified three primary issues for determination:

(a) the exact amount that was subject to the garnishee order absolute and whether the outstanding debts owed by Flextronics to Bumicircuit had been extinguished upon payment of the amount under the garnishee absolute;

(b) whether as a consequence of the payment made under the garnishee order absolute the two further payments made on 29 March 2012 and 16 April 2012 meant that Flextronics had in effect overpaid Bumicircuit in which case Flextronics was entitled to restitution of these payments; and

(c) whether Bumicircuit is obligated to refund to Flextronics for the defective PCB's supplied by Bumicircuit.

[9] We are of the view that these three issues were correctly identified by the learned judge. With the chronological backdrop of events as set out above, it is essential that the issue of the garnishee proceedings and what happened there be dealt with first. The garnishee proceedings will in essence settle Bumicircuit's claim while the next two issues really deal with Flextronics' counterclaim. The learned judge decided the first issue against Bumicircuit; hence its appeal in the second case before us. As for the counterclaim, that, too, was dismissed; hence the appeal which is the first appeal before us. We shall deal with Bumicircuit's appeal first before addressing Flextronics' counterclaim as that is obviously the more logical way to proceed.

BUMICIRCUIT'S CLAIM

[10] Bumicircuit's claim is for payment of PCB's sold and delivered to Flextronics. The fact of sale and delivery is not in dispute. What is is how that payment has been made. Flextronics claimed that it has fully paid when it paid over to Welfare a certain amount under an order of garnishee absolute. If that is so, then Bumicircuit's claim was properly dismissed. Should the contrary be true, then Bumicircuit's claim should have been allowed subject to the matter of Flextronics' counterclaim.

[11] In respect of this first issue, the learned judge made several critical findings, some of which can be readily inferred:

First, that the garnishee order had been made absolute on 16 March 2012.

Second, that the exact amount that was subject to the garnishee absolute was the sum of USD210,027.02 although the amount that Flextronics had declared earlier at the hearing of the garnishee proceedings on 16 March 2012 when the garnishee order nisi was made absolute, was USD214,929.19. After clarifying that there were some double counting and costs, the learned Judge was satisfied that the final amount that Flextronics paid over to Welfare Printed Circuits Co Ltd under the garnishee order absolute was USD210,027.02.

Third, that this amount which was garnished was in settlement of a judgment order for RM4,223,320.65 together with interests and costs which another judgment creditor, Welfare Printed Circuits Co Ltd (Welfare) had procured against Bumicircuit vide Penang High Court Civil Suit No 22 NCVC-391 of 2011.

Fourth, in accord with the terms of O 49 of the Rules of Court 2012 and the related case authorities, the learned judge found that this sum of USD210,027.02 included

A the 'amount accruing due' by Flextronics to Bumicircuit at the material time.

Fifth, with this payment of USD210,027.02 and as provided under O 49 r 8, Flextronics was 'discharged' of its liability to Bumicircuit.

Sixth, as evident from the letter in exh 'D11' and the oral testimony of SP1, Ooi Khar Thuan, the General Manager of Bumicircuit who admitted he had been informed by one of its customers of the garnishee proceedings, Bumicircuit was actually aware of the garnishee proceedings at the material time, certainly before the garnishee nisi was made absolute.

Seventh, that quite apart from the fact that there was nothing improper about obtaining the garnishee order absolute, Bumicircuit had neither appealed nor taken steps to set aside the order.

[12] We are amply satisfied that the learned judge was entirely correct in reaching his conclusion on the first issue based on the above findings. These are firm basis grounded on incontrovertible facts. Added to this is the existence of the Welfare judgment which remains undisputedly valid and enforceable even till this time. Indeed, the Welfare judgment was enforced through, inter alia, the garnishee proceedings. Those proceedings too, have remained intact as Bumicircuit has not seen it fit to challenge them or have the orders set aside. The only sound explanation for that utter silence must be in its validity. Bumicircuit cannot set about challenging either of these orders, the Welfare judgment or the garnishee order absolute, collaterally through Flextronics. Insofar as Flextronics is concerned, the amount that may be garnished by Welfare has to be an amount that it owed Bumicircuit at the material time. Should there be any doubt as to the amount especially by Bumicircuit, then it is for Bumicircuit to attend the garnishee hearing on 16 March 2012. Since it itself saw fit not to attend, it is far too late for Bumicircuit to complain. In any case, the learned judge had seen it fit to satisfy himself as to the correctness of the amount, and we have no reason to disagree.

[13] We have examined O 49 of the Rules of Court 2012 which reads as follow:

1 Attachment of debt due to judgment debtor

(1) Where a person (who is referred to as 'the judgment creditor' in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as 'the judgment debtor' in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as 'the garnishee' in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

(2) An order in Form 97 under this rule shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter, and in the meantime attaching such debt as mentioned in paragraph (1), or so much thereof as may be specified in the order, to answer the judgment or order mentioned in that paragraph and the costs of the garnishee proceedings.

(3) In this Order, 'any debt due or accruing due' includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

[14] Under O 49, Welfare is the 'judgment creditor'; Bumicircuit is the 'judgment debtor' and Flextronics is the 'garnishee'. Order 49 specifically allows for the payment from a person other than the judgment debtor, Bumicircuit, and that other person would be Flextronics, any amount of any debt whether due or accruing due to the judgment debtor in order to satisfy a judgment or order that the judgment debtor owes to another judgment creditor, which is Welfare. In other words, O 49 allows direct payment from Flextronics to Welfare instead of from Bumicircuit to Welfare subject to the conditions that there must be a judgment or order for such payment, that such judgment or order is not an order to pay some amount into court; and that there are debts due or accruing due from Flextronics to Bumicircuit. Where these conditions are met, the amount due or accruing due from Flextronics to Bumicircuit may be garnished and ordered to be paid directly to Welfare.

[15] Moving on to the matter of the amount accruing which is what we believe lies at the heart of Bumicircuit's complaints, not that there were no amounts due from Flextronics but what was precisely the amount, we find that we are also in agreement with the learned judge on this point. The exact amount that was subject to the garnishee order absolute has already been ascertained in the garnishee proceedings and it is also evident from the order itself. That sum, as ordered, is USD214,929.19. However, after explanations of double counting which were accepted by Welfare (see pp 706–707 of *RR* 2/4), Flextronics was allowed to pay the slightly lesser amount of USD210,027.02. In no way can the amount garnished or payable under the order of garnishee absolute be the sum of USD5,592.20 as claimed by Bumicircuit. In our view, whether the amount is USD214,929.19 or USD210,027.02, it includes and comprises the amount then due from Flextronics to Bumicircuit. We pause here to observe that it is indisputable that Flextronics paid Welfare the sum of USD210,027.02. This sum went towards satisfaction of a judgment entered against Bumicircuit by Welfare, which judgment whose validity is beyond question. There appears to be an appeal lodged by Bumicircuit against the judgment entered by Welfare (see p 666 of *RR* 2/3). However, nothing seems to have come out of that; certainly nothing that the learned judge was made aware of at the time of trial or, even us, at the time of the disposal of the appeal. In any

event, the garnishee proceedings have never been set aside even to this date and that is an undisputable and material fact.

[16] Returning to the matter of the lesser amount that ought to have been garnished, Bumicircuit alleged that Flextronics had agreed at a meeting on 4 April 2012 that the amount to be garnished was USD5,592.20. Several of Flextronics' senior management had attended that meeting. Having agreed that that was the proper amount accruing due to Bumicircuit and that the remaining amounts had yet to accrue because the goods were still within the agreed period of credit, Flextronics had taken upon itself the responsibility of paying any sum above USD5,592.20. The minutes of the meeting were carried in the email dated 5 April 2012 sent by Bumicircuit to Flextronics — see exh 'P4'. This sum was confirmed in subsequent emails sent by Flextronics — see exhs 'P5', 'P6' and 'P9'. Flextronics' payment of USD210,027.02 on 26 April 2012 was thereby in breach of the terms agreed on 4 April 2012 and it was for Flextronics to sort out with Welfare over this excess payment, not Bumicircuit.

[17] This argument turns specifically on the meaning of the words 'the amount of *any debt due or accruing due* to the judgment debtor from the garnishee' in O 49 r 1. Bumicircuit's submission, aside from the purported agreement between parties on 4 April 2012, is that a large part of the sum sought to be garnished by Welfare was in fact not liable to be garnished. This was because of the arrangements between the parties, that all PCB's delivered by Bumicircuit enjoyed a 30 plus 60 day credit period. These periods did not run until Flextronics had used the PCB's which were delivered first on a standby basis. It was after Flextronics had used the PCB's that the accounts will be updated (*kemaskini*) and the 60 day credit period begins. The amounts though ascertained were not due as they had not matured. That being so, there was no debt due as at the date of the garnishee order nisi for any order to be made — see *Saw Swan Kee v Sim Lim Finance (M) Berhad* [1985] 1 MLJ 221. Flextronics will therefore have to bear the entire payment less the matured sum of USD5,592.20 in which case, Flextronics still owed Bumicircuit for the PCB's delivered.

[18] The learned judge disagreed with this submission, finding that the fact that just because there were these contractual credit periods did not mean that the debt was not accruing due within the meaning of O 49 r 1. We agree.

[19] As a preliminary issue, we must say that we agree with the learned judge that it was for Bumicircuit to attend and address the court on precisely this matter now raised. Bumicircuit chose not to attend despite being aware of the garnishee proceedings. These matters, if valid, ought to be addressed at those proceedings or at the very least in proceedings taken specifically to set aside the

garnishee order absolute. Bumicircuit's claims against Flextronics are not such proceedings and do not even come close. The added difficulty we have with this issue raised at this point in these present proceedings is the exclusion of Welfare and their right to be heard. After all, the garnishee proceedings were initiated by Welfare and any contestations must necessarily involve them. They are not included in the present appeal, be it here or at the trial. Welfare may well have good reasons to oppose the Bumicircuit's arguments. Since Bumicircuit did not file such challenge proceedings or attend the hearing, and it chose not to, we say once again, that it is both too late and highly inappropriate for Bumicircuit to make this challenge through this action; and even then through a reply to Flextronics' defence and a defence to its counterclaim. The garnishee order absolute that was ordered by the court on 16 April 2012 not only must be given respect to; it has in fact been complied with. In any event, O 49 r 8 further provides an answer to Bumicircuit's contention here; a point which we will address shortly.

[20] That Bumicircuit must necessarily raise its resistance and show cause or basis for its objections at the garnishee proceedings is evident from the requirements of O 49 r 2 which requires the application papers to be also served on Bumicircuit; and from all the cases relied on by Bumicircuit. In *Saw Swan Kee v Sim Lim Finance (M) Berhad*, the judgment debtor had attended the garnishee proceedings and had objected. In any case, we are of the view that one must be careful when reading *Saw Swan Kee*. The matter under consideration before the Federal Court in that case was not O 49 r 1 and whether the garnishment may be ordered over 'the amount of any debt due or accruing due to the judgment debtor from the garnishee'. Rather, the case is an authority on the right of the garnishee, such as Flextronics, to set off an actionable debt against a debt attached. It was the conclusion of the Federal Court that the garnishee could not do so, on the facts. The garnishee was the bank from whom the judgment debtor had taken out a loan of $25,000 under a financial arrangement where the garnishee bank had security of first legal charge on the property. The judgment creditor as garnisher had obtained a judgment in default against the housing developer. That judgment saw a refund of progress payments that the judgment debtor had agreed to refund when the judgment creditor as garnisher, agreed to give up her rights to complete the sale and purchase agreement. This arrangement enabled the judgment debtor to resell the property at an increased price to third parties who had, inter alia, raised the purchase monies through the loan from the bank garnishee.

[21] The Federal Court agreed with the learned judge that the garnishee could set off against the judgment debtor but not the judgment creditor. However, the Federal Court disagreed with the learned judge that on the facts, there was a debt owing to the garnishee which existed when the order nisi was made. The garnishee had claimed that when the order nisi was made, there was

in existence a debt due and owing to the garnishee for which the garnishee could then setoff the appropriate amount. The Federal Court examined the two letters which were relied on to support the garnishee's contention and the Federal Court found that the learned judge had fallen into error in treating the balance of secured loans as an actionable debt when it was not. It was in this context that the Federal Court discussed the issue of actionable debt, that had the learned judge considered the date of expiry of the various loans, or whether the date of expiry had been waived by the imposition of interest after such expiry, and whether a demand for repayment had been made under the provisions of the National Land Code, he would have found that there was no actionable debt at the material time of the order nisi. Consequently, the Federal Court allowed the appeal, set aside the order discharging the garnishment order nisi and ordered the order nisi to be made absolute.

[22] Although the Court of Appeal in *Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 1)* [2014] 4 MLJ 398 did refer to the above Federal Court's decision of *Saw Swan Kee*, that the debt has to be actionable at the time of the application for the garnishee order, *Saw Swan Kee* ought to be appreciated as authority on a different point. In *Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 1)*, the Court of Appeal affirmed the decision of the first instance court in setting aside a garnishee order. In *Tiong Hoo Teck*, the judgment creditor sought to garnish 'the amount of any debt due or accruing due to the judgment debtor from the garnishee or so much thereof as is sufficient to satisfy the judgment and the costs of the garnishee proceedings'. The judgment creditor relied on a financial statement of the judgment debtor that showed that amongst the current assets of the judgment debtor are 'other receivables' in the sum of RM3,194,072. Part of that sum included 'sundry receivables' of RM766,054 due from a firm and a company which the directors have substantial financial interest. However, the identities of the firm and the directors involved as well as the amount due from each of them were not available and not established. The financial statement exhibited was also not complete. With all these discrepancies and insufficiencies, the Court of Appeal agreed with the learned judge that the garnishee order must be set aside.

[23] Again, we see all these arguments on the garnishment proceedings taken either at the hearing for the garnishee order or at subsequent proceedings initiated to set aside the garnishee order. That is not the case here; and it is highly irregular if not wrong to entertain this course of challenge by Bumicircuit. Bumicircuit ought to have attended the hearing on 16 April 2012 and resist the garnishee order nisi being made absolute. These arguments cannot be taken through these proceedings and none of the cases cited by Bumicircuit say otherwise.

[24] In an earlier Court of Appeal decision of *Cheong Heng Loong Goldsmiths*

(KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353, a decision not referred to in *Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 1)*, the issue of whether there was a debt owing from the garnishee to the judgment debtor at the time of the attachment proceedings was deliberated at some length. At para 34 of its judgment, the Court of Appeal said:

> ... In answering this question we derive much assistance from the following passage in the judgment of Venkatarama Iyer J delivered on behalf of a Full Bench of the Supreme Court of India in *Shanti Prasad Jain v Director of Enforcement Foreign Exchange Regulation Act* AIR 1962 SC 1764 (refd):
>
> > A contingent debt is strictly speaking not a debt at all. In its ordinary as well as its legal sense, a debt is a sum of money payable under an existing obligation. It may be payable forthwith, solvendum in praesenti, then it is a debt 'due' or it may be payable at a future date, solvendum future; then it is a debt 'accruing'. But in either case it is a debt. But *a contingent debt* has no present existence, because it *is payable only when the contingency happens,* and *ex hypothesi* that may or may not happen.
>
> The question whether a contingent debt is a debt as understood in law has often come up for consideration before English Courts in connection with garnishee proceedings taken by judgment creditors to attach it as a debt. The decision has invariably been that they are not debts 'accruing' and could not be attached. In *Webb v Stenton* (1883) 11 QBD 518 the point for decision was whether an amount payable by a trustee to the beneficiary in future could be attached by a judgment creditor as a debt 'owing or accruing', and it was answered in the negative. Discussing the distinction between an existing debt and a contingent debt, Lord Lindley observed:
>
> > I should say apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable but a debt which is represented by an existing obligation. The result seems to me to be this: you may attach all debts, whether equitable or legal; but only debts can be attached; and money which may or may not become payable from a trustee to his *cestui que trust* are not debts.
>
> The meaning of 'accruing debt' observed Lord Blackburn in *Tapp v Jones* (1875) 10 QB 591 'is *debitum in praesenti solvendum in futuro*; but it goes no further, and it does not comprise anything which may be a debt, however, probable or however soon it may be a debt'.
>
> *The law is thus well settled that a contingent debt is no debt until the contingency happens,* and as the right of the appellant to the amount in deposit in his name in the Deutsche Bank arises only, on the happening of the contingencies already mentioned, it follows that there is no debt due to him in praesenti ... (Emphasis added.)

35. Now, applying the definition of a debt by Lindley LJ in *Webb v Stenton* and

A accepting the proposition that a contingent debt is not a debt until the contingency happens, it is clear that on the facts of the present case, the requisite contingency has happened. The question posed, namely, whether there was a debt owing from the respondent to Chan as at the date when the attachment proceedings were commenced by the appellant, must be answered in the affirmative.

B 36. We would then summarise our views as follows. The respondent's promise to indemnify Chan in the event of a genuine robbery crystallised on the happening of the robbery. The fact that the robbery was genuine and not faked is established by the respondent's own document which is not hearsay but original evidence. The respondent's allegation that there were other breaches by Chan and that therefore C there was no debt due and owing is inadmissible as these were never pleaded. Accordingly, there was at all material times a debt due and owing *in praesenti* from the respondent to Chan which was capable of being attached by the appellant in the hands of the respondent at the date of the garnishee proceedings: see *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, garnishee)* [1988] 1 MLJ 434 (refd), per Lim Beng Choon J.

D 37. For the reasons already given, the appeal is allowed. The order of the High Court is set aside. Judgment is entered in the appellants favour in the sum of RM600,000 together with interest at the rate of 8%pa from 21 November 1985 until realisation. The respondent must pay the costs of this appeal and all costs incurred in the court below. The deposit paid into court shall be refunded to the appellant.

E

[25] In both decisions as well as the decision of the learned judge in this instant appeal, the decision of Lim Beng Choon J in *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, garnishee)* [1988] F 1 MLJ 434 on garnishee proceedings have been referred to and followed. In his judgment, Lim Beng Choon J said:

The sole issue arising from this appeal is whether the sum of $101,716.51, already earned by the judgment debtor in respect of the works which they had carried out under the contract for the construction of the Jitra/Alor Setar Highway Project, and G which sum was retained by the garnishee as retention money for the purpose of compensating the latter for defects in the works carried out by the judgment creditor, could be garnished under O 49 r 1 of the Rules of the High Court 1980.

[26] His Lordship examined a line of authorities that had attempted to H define these critical words of 'debt due or accruing due' in O 49 r 1. The difficulty actually is in distinguishing between 'a case where a debt has not accrued and there is no actual debt, and a case where there is a debt debitum in praesenti solvendum in futuro. However that may be, the matter was dealt with by Blackburn J in *Tapp v Jones; Pooley, Garnishee* (1875) LR 10 QB 591 where I one of the contentions articulated by the garnishee in his application to, inter alia, set aside or alter the order of payment was that there must be a limit as regards to payment and the limit was to pay the debt that was actually due and payable'. In rejecting this first contention, Blackburn J said:

It is evident that the legislature had in view both present debt and future debt, *debita*

in praesenti, solvenda in futuro, for it speaks in the earlier part of the section of 'debts owing and accruing'. Therefore it is clear that the attachment was good. But in the latter part of the section the language is altered. It speaks merely of 'the debt due'. Now it is quite clear that the garnishee cannot be bound to pay his debt before it is due; so that we must read 'the debt due' as meaning either the debt when due, or the debt then due. If the former reading be the correct one, then the present order was quite right; if the latter, then it was premature. I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as and when they become payable, instead of making a fresh order as each falls due.

[27] A second decision that was examined was the Court of Appeal's decision in *Webb v Stenton & Others, Garnishees* (1883) 11 QBD 518 at pp 526–528 where Lindley LJ was of the following view:

I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation.

[28] Two other cases were also considered: *O'Driscoll and Another v Manchester Insurance Committee* [1915] 3 KB 499 and *Hall and Another v Pritchett The Corporation of Huddersfield, Garnishees* (1877) 3 QBD 215 before His Lordship set out the following propositions that must be considered when determining whether a garnishee order ought to be granted or to be made absolute:

From the principles enunciated in the aforesaid cases, the following propositions can safely be distilled:

(1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt *in presenti,* of course an order can be made to attach the debt.

(2) If there is not a debt payable *in presenti,* but there is a debt in existence, *debitum in presenti,* but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.

(3) The words 'or accruing' are intended to apply to those cases in which there are *debita in praesenti, solvenda in futuro* (debts owed at present time payable in the future). It is not enough to show that it is very probable that there soon will be a debt; it must be shown that there is a debt.

(4) *A debitum in presenti* not yet actually payable is nevertheless a debt which is represented by an existing obligation.

[29] These are sound fundamental propositions interpreting O 49 r 1 and we adopt the same. It is our view that even if we were to entertain Bumicircuit's

A complaints, which we refuse, Bumicircuit's complaints are of no merit. The phrase 'the amount of any debt due or accruing due to the judgment debtor from the garnishee' includes the debt that Flextronics owed Bumicircuit at the material time, even if the payment is payable at a deferred date with the credit terms purportedly agreed between the parties. It would be different had the B debt sought to be garnished was a contingent debt. Had that been the case, which in Flextronics' case it was not, then as expressed in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor*, the 'debt' is 'strictly speaking not a debt at all'. The debt must be in existence at the time of the application, though the time for payment may be sometime in the future. Since that was the case with C the amount garnished, Bumicircuit's submission is of no merit.

[30] Now, even if for a moment there is any merit in Bumicircuit's argument that the right amount due from Flextronics is USD5,592.20 and not D USD210,027.02, and that only USD5,592.20 should have been garnished, which we disagree just as the learned judge did, what is clearly evident is that Flextronics' payment of USD210,027.02 went a long way to substantially settle the Welfare judgment, a benefit which Bumicircuit cannot deny. Otherwise, Bumicircuit would have been accountable to Welfare for even E more.

[31] Therefore, the exact amount that was subject to the garnishee order absolute is USD210,027.02 which amount has been fully settled by Flextronics. At that material time, Bumicircuit had delivered to Flextronics F PCB's to that value which meant Flextronics did owe Bumicircuit that same sum. With the payment of that sum to Welfare pursuant to the garnishee order absolute, Flextronics is validly discharged in law and on the facts from its liability to Bumicircuit for that same amount. This is clearly provided under O 49 r 8:

G

> 8 Discharge of garnishee
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> Any payment made by a garnishee in compliance with an order absolute under this Order, and any execution levied against him in pursuance of such an order, shall be a valid discharge of his liability to the judgment debtor to the extent of the amount H paid or levied notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which they arose reversed.

[32] With this payment under the garnishee order absolute, Flextronics' debt to Bumicircuit to the sum of USD210,027.02 is extinguished. Given that I Bumicircuit's claim against Flextronics is for the sum of RM369,978.05 (USD120,907.88), we agree with the learned judge that Bumicircuit's claim against Flextronics must necessarily fail. Consequently, we affirm His Lordship's decision on the dismissal of Bumicircuit's claim and dismiss its appeal.

COUNTERCLAIM

[33] Moving next to the counterclaim which is the subject matter of Flextronics' appeal. This essentially deals with the second and third issues as identified by the learned judge.

[34] Flextronics' arguments are as follow. During the time of the garnishee proceedings, it placed further orders to the value of USD92,075.16. Proforma invoices are as seen at exh 'D16' and at pp 719–722 and 733–734 of *RR Jld* 2/4. Flextronics claimed that its payment of this sum amounted to an advance as the PCB's were not delivered till after a second payment of USD171,363.18 was paid. At the time of this second payment, Flextronics claimed that Bumicircuit had only delivered PCB's to the value of USD42,601.88 although subsequently all the PCB's ordered were delivered. Flextronics claimed that it paid both sums under protest — see exh 'D32' at pp 716–718. Arising from these two payments, Flextronics claimed that there was an overpayment of USD89,582.07, and that there should be a refund of USD16,369.79 for defective and/or poor quality bringing the whole sum counterclaimed as USD105,951.86.

[35] Flextronics contended before us that it was erroneous for the learned judge to dismiss the whole counterclaim, particularly by treating the whole claim as if it comprises just a single claim of complaint on the quality of the PCB's delivered when it is not. The counterclaim comprises the claim of overpayment and the matter of the quality.

[36] There appears to be some merit in this submission. We do not find any distinct deliberation on the matter of overpayment, only on the matter of 'the alleged faulty and goods of no quality', in the grounds of decision. However, we may surmise from para 6 of his decision that the learned judge did indicate that after Flextronics paid the second sum of USD171,363.18, Bumicircuit supplied the 'remaining' interface boards which were only received after the date of delivery specified in the purchase order. From this, it would seem that the learned judge had understood the matter of overpayment as overpaying for PCB's which were never sent or received. Hence, when all the PCB's were ultimately received by Flextronics, the matter of overpayment did not arise.

[37] We can understand how the learned judge came to this erroneous conclusion. It was really the way Flextronics had explained its case. Flextronics had explained that although it had paid the first advance payment of USD92,075.16 on 29 March 2012, it only received USD42,601.88 worth of PCB's. So, when it paid the second payment of USD171,363.18, there was already this short delivery for which there was this apparent overpayment.

[38] We believe this part of the counterclaim is better explained by examining the total sales and payment. According to the evidence at exh 'D34' found at pp 755–757 of *RR* 2/4, up to June 2012, there was a total sale of PCB's by Bumicircuit to Flextronics of USD383,883.32. For these sales, Flextronics paid a total sum of USD473,465.39 as follows:

(a) payment to Welfare (order of garnishee) — USD210,027.02;

(b) payment to Bumicircuit on 29 March 2012 — USD92,075.16; and

(c) payment to Bumicircuit on 16 April 2012 — USD171,365.18

[39] Having examined the records of appeal and upon considering all the submissions of both learned counsel, we find that the failure of the learned judge to properly consider this part of the counterclaim warrants appellate intervention. There was indeed overpayment for which Bumicircuit's only explanation was that there was delivery of the goods ordered and that Flextronics ought not have paid the sum of USD210,027.02 to Welfare. The argument on payment to Welfare under the order of garnishee has already been quite comprehensively dealt with above. As for the other submission, we find that it does not explain the overpayment at all. On this score alone, having satisfactorily proved its case of overpayment, this part of the counterclaim ought to have been allowed. Since it was not, the appeal in relation to this part of the counterclaim is allowed.

[40] On the second issue of 'the alleged faulty and goods of no quality' for which Flextronics sought a refund or discount of USD16,369.79, the learned judge had dismissed the claim because the issue was 'not at all canvassed or ventilated' by Flextronics. The particulars and details of the alleged faulty PCB's were also not pleaded in its defence. The learned judge found that SD2, Krishnanthasan Varatharajoo, the financial controller of Flextronics had also testified that all the PCB's ordered were delivered between March–June 2012. He had also admitted that Flextronics' attempt to return the goods in September 2012 was beyond the period stipulated under the standard terms and conditions of purchase.

[41] With respect, we must also disagree with the learned judge on the dismissal of this other component of the counterclaim. There is plea to the effect that there was faulty and goods of no quality in the defence — see especially paras 22–24 and 32. What Flextronics had pleaded was that Bumicircuit had supplied interface boards which were faulty and/or of poor quality contrary to the terms and conditions of its purchase orders. In accordance with the terms and conditions, Flextronics had informed Bumicircuit to collect these faulty and/or poor quality interface boards back. Bumicircuit did not do so. On its own, Flextronics attempted to return these faulty interface boards via freight. Bumicircuit refused to accept delivery. It also

refused to replace them. Given these circumstances, Flextronics counterclaimed the sum of USD16,369.79, the details of the interface boards affected are at exh 'D18' at p 739 of *RR* 2/4.

[42] In its reply and defence to the counterclaim, Bumicircuit denied that there were defects or poor quality interface boards delivered. It claimed that Flextronics was obliged to return any defective or poor quality interface boards within seven days from delivery, as required under its invoices and delivery orders. Since Flextronics only raised this complaint a year after and only after Bumicircuit sought payment, Flextronics was not entitled to any refund or replacement.

[43] For a start, it appears from the submissions and evidence led at trial that the matter of the existence of complaints by Flextronics of defective, faulty and/or poor quality interface boards or PCB's is not really the issue in dispute. What is in dispute is whether Flextronics had notified Bumicircuit of the same at the material time and whether such notification is in accordance with the terms and conditions of sale so as to entitle Flextronics to remedies under the contract of sale and in law.

[44] Now, contrary to the learned judge's finding, it is evident that the parties were well aware of this aspect of the counterclaim. The issue was indeed properly pleaded, canvassed and quite fully ventilated by not just Flextronics, but by both parties. Witnesses of both sides testified on the issue and this is apparent from the notes of proceedings as well as the submissions of both learned counsel. SD1 testified on the faulty and/or poor quality of the PCB's to which not only did Flextronics list the defects and raise the complaints with Bumicircuit at the material time through the emails sent, Flextronics also issued three debit notes to that effect — see list of defects at exh 'D18' at p 739 of *RR* 2/4; emails at exhs 'D20' and 'D33' at pp 737 and 740 of *RR* 2/4 as well as those at pp 743–751 of *RR* 2/4 showing 'NCMR' or non-conforming material report; and debit notes at 'D19A' and 'D19B' at pp 741–742 respectively of *RR* 2/4.

[45] SD1 had also testified that it had informed Bumicircuit to take back the defective interface boards but Bumicircuit failed to do so. He further testified that Flextronics had made arrangements to have the defective interface boards returned to Bumicircuit since Bumicircuit did not pick them up. However, '... the cargo is not being accepted by Bumicircuit; the driver was chased out and the truck was not allowed to enter the premises. Not even a single dot was endorsed on the document. Instruction was given by Bumi mgmt to all the staff not to entertain the driver. I had communicated with our trucker to leave the premises and sent back to us'. All this was not taken into account or considered

by the learned judge. We believe that had His Lordship done so, he would have found this part of the counterclaim, proved and consequently allow the counterclaim.

[46] As for the matter of the alleged non-notification to Bumicircuit within the seven day period, which was really the reason why this part of the counterclaim was dismissed, the learned judge found that SD2 had admitted in his evidence that Flextronics attempted to return the goods in the month of September 2012. By this time, it 'was beyond the period of 30 days from the date of receipt being the period provided under the standard terms and conditions of purchase from Flextronics for the inspection and acceptance testing'. With respect to the learned judge, the pleaded defence of Bumicircuit is that the time period for protest or return of any defective interface board was seven days, and not 30 days. In any event, Flextronics had offered an explanation on how the terms and conditions for acceptance and return were between the parties. Given that the parties evidently had a business relationship and a course of dealings with one another, regard ought to have been given to the evidence tendered. This evidence is both relevant and material to the issue of the right to complain and the right or obligation to accept or reject that complaint.

[47] Both DW1 and DW2 testified that there was a procedure for the return of the faulty or poor interface boards. According to them, the terms and conditions of purchase were that there would be an inspection and acceptance testing on all products purchased from Bumicircuit within 30 days from the date of receipt of the interface boards. For this purpose, Bumicircuit would send a representative to Flextronics so that a verification can be conducted. Once that is completed, Flextronics will deliver the affected PCB's back to Bumicircuit. The representative went to Flextronics' premises on a monthly basis. DW2 testified that Bumicircuit stopped sending its representative after the parties fell into disagreement over the garnishee issue. PW1 agreed that Bumicircuit stopped sending its representative from April 2012.

[48] Again, these pieces of evidence were not considered at all by the learned judge. Had His Lordship considered and evaluated them, the counterclaim would have been allowed. This evidence were not merely oral evidence of witnesses called by Flextronics but is evidence clearly supported by contemporaneous documentary evidence, all of which have already been pointed out earlier. In that documentary evidence, there is not a single piece of evidence showing protest or basis of rejection by Bumicircuit. Instead, Bumicircuit remained quite silent throughout this exercise, until the counterclaim was filed. All it did at the material time was to refuse to accept the affected PCB's back. This was confirmed by PW1 in cross-examination.

[49] With the existence of faulty and/or poor PCB's proved, and this includes the details of the costs of the affected PCB's which was also not seriously contested by Bumicircuit; and the reasons why Flextronics had not returned in the manner that Bumicircuit claimed ought to have been followed, properly and reasonably explained; we find that contrary to the learned judge's decision, Flextronics' counterclaim was clearly satisfactorily proved. This aspect of the counterclaim too, ought to have been allowed. With this failure to properly, fully and reasonably consider and evaluate all the relevant and material evidence tendered, the learned judge had unfortunately arrived at an erroneous decision.

[50] For all the above reasons, we were convinced that this was most certainly an appropriate case for us to intervene. The learned judge had fallen into error in principle and had misapprehended the facts which merits setting right by this court. Both facets of the counterclaim were more than adequately proved by particularly documentary evidence, and the counterclaim ought to have been allowed in full. Consequently, Flextronics' appeal on the dismissal of its counterclaim is allowed with costs. Flextronics' counterclaim is allowed in the terms as prayed. Further, we dismiss Bumicircuit's appeal on the dismissal of its claim with costs. As for costs, we make one order of costs for here and below, a sum of RM30,000 to Flextronics subject to payment of allocator. Both deposits are to be refunded to the respective appellants.

Flextronics' appeal against dismissal of counterclaim allowed; Bumicircuit's appeal against dismissal of its claim dismissed.

Reported by Ashok Kumar